BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARLA E. YORK	)	
Claimant	)	
VS.	)	
	)	Docket No. 259,059
MERCY HOSPITAL	)	
Respondent	)	
AND	)	
	)	
MERCY HEALTH SYSTEM OF KANSAS, INC.	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the November 15, 2000 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

Claimant was injured July 13, 2000 while working for respondent. This is not disputed, at least for purposes of this review. What is disputed is whether on July 27, 2000 claimant suffered a new accident and injury or whether instead, the later incident was a temporary worsening of her previous work related injury. Finding claimant's current condition and need for medical treatment to be a natural progression of the original injury, Judge Frobish awarded claimant preliminary benefits. Respondent contends that claimant's current condition and need for medical treatment is not the result of the July 13, 2000 accident at work but instead is the result of a subsequent accident and intervening injury that occurred at the claimant's home on July 27, 2000. Therefore, the issue is whether claimant's current temporary total disability and need for medical treatment are due to an accidental injury that arose out of and in the course of claimant's employment with respondent. This issue is considered jurisdictional and is subject to review by the Board on an appeal from a preliminary hearing order.[1]

FINDINGS OF FACT

1. On July 13, 2000 claimant injured her low back in the course of performing her regular job duties as a certified nurses aide and home health aide for respondent.

[1] K.S.A. 44-534a(a)(2) and K.S.A. 44-551(b)(1).

Claimant verbally reported this incident to her supervisor, Rhonda Howerter, but did not submit an incident report. Instead, she went home and had her boyfriend rub her back. Afterwards, claimant told Ms. Howerter she felt "okay". Claimant did not request medical treatment from her employer and did not seek medical treatment on her own at that time.

2. Claimant was not scheduled to work again until July 17. Claimant returned and worked her regular schedule performing her regular job duties without incident or complaint.

3. On July 27, 2000, claimant was at home when she bent over to remove laundry from the clothes dryer and felt something "snap" in her low back. She had an acute onset of pain and was unable to stand up without assistance from her son. On July 30 Claimant went to the Coffeyville Regional Medical Center emergency room because she could not tolerate the pain any longer. The next day, July 31, claimant went to work and reported that her injury was from the July 13 incident at work and she filled out an Incident Report which also described the July 27 incident at home. She was then referred to the company physician, Dr. Larry C. Atwood.

4. Dr. Atwood's records indicate that claimant described an initial incident on July 13 when she was changing a mattress and it flipped over and knocked her to the floor. She experienced an onset of low back pain but was better the next day. She returned to work on July 17 and was doing well until the July 27 incident at home. Although claimant denied giving Dr. Atwood this history, it corresponded with the testimony of claimant's supervisor, Rhonda Howerter. Dr. Atwood treated claimant until September 7, 2000 when benefits were terminated by respondent's insurance carrier.

5. Claimant was referred by her attorney to Dr. Brian K. Ellefsen who opined that claimant experienced only a temporary worsening of her low back condition by the incident of July 27 and that her present condition was due to the accident of July 13. But Dr. Ellefson apparently believed that claimant had attempted to return to work on July 16 and her pain increased to the point where claimant was unable to continue working. Thus, it appears that the foundation for Dr. Ellefsen's opinion is incorrect. His causation opinion, therefore, is given little weight.

CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue

[2] K.S.A. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

is more probably true than not true on the basis of the whole record."[3] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[4]

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[5] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[6] Acknowledging this case was "a very close call", the ALJ found that claimant's later incident at home did not constitute an intervening accident and that it only caused a temporary worsening of claimant's condition. Accordingly, he found the current complaints were compensable as a direct and natural consequence of the original July 13, 2000 work related injury. The Board, however, believes the greater weight of the credible evidence shows that claimant returned to work after the July 13, 2000 accident and performed her regular duties without complaint until the accident at home on July 27, 2000. Claimant's testimony that after the July 13 accident she was unable to do her regular job, was in obvious pain and was given light duty work is contradicted by her supervisor, Ms. Howerter, by the Incident Report, by the records of the treating physician, Dr. Atwood, and by the hospital's records.

Based upon the record compiled to date, the Board finds the greater weight of the credible evidence fails to support the claimant's contentions. Therefore, the ALJ's decision to award preliminary benefits should be reversed. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[7]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Jon L. Frobish on November 15, 2000, should be, and the same is hereby, reversed and benefits are denied.

IT IS SO ORDERED.

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[3] K.S.A. 44-508(g). *See also* *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-501(g).

[5] Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

[6] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973). *See also* Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

[7] K.S.A. 44-534a(a)(2).

Dated this ____ day of March 2001.

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
Leigh C. Hudson, Fort Scott, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director